IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL MISC. APPLICATION NO. 89 OF 2004.

Shri Anil Vassudeva Salgaonkar,
aged 63 years, resident of
Gogol, Margao, Goa. ... Petitioner.

VERSUS

S T A T E,
through the Public Prosecutor,
High Court of Bombay at Goa. ... Respondent.

Shri D. Pangam, Advocate for the Petitioner.

Shri S.N. Sardessai, Public Prosecutor for the State/ Respondent.

**CORAM: N.A. BRITTO, J.**

DATE: 22ND JULY, 2004.

ORAL ORDER;

The petitioner who is the Managing Director of M/s Salgaonkar Mining Industries Ltd., Margao, has invoked the jurisdiction of this Court under Section 482 of the Code of Criminal Procedure, 1973 (Code, for short) firstly to quash and set aside the process issued against him by the learned J.M.F.C., Mapusa in C.C. No.266/2001/A under Section 188 of I.P.C. and secondly, in the alternative, to transfer the said case to any Court of equal or superior jurisdiction in Margao.

2. Some facts are required to be stated to dispose of the present petition.

3. The District Magistrate, Panaji, issued a conditional Order on or about 7.7.2000 to the said M/s. Salgaonkar Mining Industries Ltd., under Section 133 of the Code directing the removal of the grounded vessel "M.V. River Princess" or to show cause as to why the said Order should not be enforced. Subsequently, the said conditional Order was made absolute on or about 21.11.2000 by the learned District Magistrate and a revision filed against the same to the Court of Sessions came to be dismissed by Order dated 2.2.2001.

4. On 13.2.2001 the said Company was issued with an Order under Section 141(2) of the Code calling upon the said Company to submit their claim within a period of 48 hours and further informing the said Company that the District Magistrate would get the act performed under Section 141(2) of the Code. As against this order, the said Company filed another revision petition to the Court of Sessions and the learned Addl. Sessions Judge by his Order dated 22.5.2001 set aside the order of the learned District Magistrate by his Order dated 13.2.2001 and further directed the District Magistrate to issue a

proper order under Section 141(1) of the Code.

5. The record shows that on 27.6.2001 the learned District Magistrate took up further proceedings in the light of the said Order of the learned Addl. Sessions Judge dated 22.5.2001, and, only on 31.7.2001 that the learned District Magistrate directed the said Company by Notice under section 141(1) of the Code to comply with the order of the District Magistrate within thirty days and failing which, action under Section 188 I.P.C. would be taken.

6. The record also shows that prior to expiry of 30 days from 31.7.2001 or for that matter prior to 27.6.2001 the learned District Magistrate had already filed his complaint dated 19.6.2001 to the Superintendent of Police complaining that the said Company had violated the said Order dated 21.11.2000 passed in proceedings under Section 133 of the Code, and, therefore action be taken under Section 188 I.P.C.

7. It is this complaint dated 19.6.2001 of the learned District Magistrate that came to be investigated by the Calangute Police Station and a final report was filed against the petitioner as

Managing Director and other Directors of the said Company and based on the charge sheet that process came to be issued against the petitioner under Section 188 I.P.C.

8. As far as the second prayer sought by the petitioner is concerned, one does not even know who are the witnesses or their addresses and therefore it would be too premature at this stage to jump to a conclusion that the witnesses to be examined by the petitioner in defence of his case would be from South Goa and therefore the said case ought to be transferred to any of the Courts in South Goa. Apparently, the witnesses sought to be examined by the prosecution are all from North Goa District. It is obvious that the second prayer in the petition has been most casually made and therefore deserves to be rejected.

9. The first point which needs to be considered is whether the petitioner would be entitled to and this Court would be justified in invoking its jurisdiction under Section 482 of the Code. Admittedly, the process issued against the accused, as the law stands today, could be rescinded by the learned J.M.F.C. in case it was shown to the learned J.M.F.C. that because of bars created by

certain provisions of the Code the same could not have been issued. The petitioner could also approach the court of Sessions in revision against the said order issuing process against the petitioner.

10. Shri Sardessai, the learned P.P. also submits that the proceedings against the petitioner could be stopped by the learned Magistrate under Section 258 of the Code.

11. Both the parties have relied upon several decided cases: On behalf of the petitioner, in support of submission that this is a fit case to exercise jurisdiction under Section 482 of the Code, and on behalf of the respondent, that this is not a fit case to exercise such jurisdiction.

12. There is no doubt that the powers saved under Section 482 of the Code are extraordinary in nature and are to be exercised sparingly and in the rarest of rare cases and to meet the ends of justice.

13. In my view, it has been the consistent view of the Hon'ble Supreme Court that these powers are

to be exercised where:

(i) it manifestly appears that there is a legal bar against institution or continuance of the criminal proceedings in respect of an offence alleged. Absence of requisite sanction, may, for instance, furnish cases under this category;

(ii) the allegations in the F.I.R. or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged (See A.I.R. 1960 S.C. 866 and A.I.R. 1977 S.C. 1754).

14. In the case of **Pepsi Foods Ltd. and another v. Special Judicial Magistrate and Others** (1998) 5 S.C.C. 749 the Hon'ble Supreme Court observed that the High Court under Arts.226 and 227 of the Constitution and under Section 482 of the Code have no limits but more the power more due care and caution is to be exercised while invoking these powers. The Hon'ble Supreme Court further observed that the inherent powers under Section 482 of the Code are to be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice. Referring to the case of **State of haryana v. Bhajan Lal** (1992 Supp (1) SCC 335) the

Hon'ble Supreme Court observed that those guidelines laid down would not be inflexible or laying rigid formulae to be followed by the courts. Exercise of such power would depend upon the facts and circumstances of each case but with the sole purpose to prevent abuse of the process of any court or otherwise to secure the ends of justice.

15. In the case of **S.W. Palanitkar and others v. State of Bihar and another** (2002) 1 S.C.C. 241 the Supreme Court observed that while considering power under Section 482 of the Code the High Court has to look at the object and purpose for which such power is conferred on it under the said provision. Exercise of inherent power is available to the High Court to give effect to any order under Cr.P.C. or to prevent abuse of the process of any court or otherwise to secure the ends of justice and the said exercise should be consistent with the scope and ambit of the same in the light of the decisions of the Supreme Court and in appropriate cases, to prevent judicial process from being an instrument of oppression or harassment in the hands of frustrated or vindictive litigants.

16. In the case of **M. Narayandas v. State of Karnataka and others** [(2003) 11 SCC 251]/2003 (**4)**

Crimes 159 (SC), the Supreme Court illustrated several categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of process of any court or otherwise to secure the ends of justice and further observing that it would not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.Amongst the illustrations given where such power could be exercised, is a case where there is an express legal bar engrafted in any of the provisions of the Code or the Act concerned (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings (emphasis supplied).

17. In the case of **State of Madhya Pradesh v. Awadh Kishore Gupta and Ors.** [2004 (2) Crimes 310 (SC)] the Hon'ble Supreme Court has observed that while exercising power under section 482 of the Code, it is not permissible for the Court to act as if it was a trial court. At the same time, the Supreme Court has observed that exercise of power under S.482 of the Code is an exception and a not a rule and that the section does not confer any new

powers on the High Court an that it only saves the inherent power which the Court possessed before the enactment of the Code. The Supreme Court also stated that it envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (emphasis supplied)

(i) to give effect to an order under the Code,

(ii) to prevent abuse of the process of court, and

(iii) to otherwise secure the ends of justice.

18. The Supreme Court also observed that it was neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. The Supreme Court further observed that where investigation was not complete it was impermissible for the High Court to look into materials, the acceptability of which is essentially a matter for trial. At the same time the Supreme Court followed the view in the case of **State of Haryana v. Bhajan Lal** (1992 Supp (1) SCC 335) and recognised the principle that the power could be

exercised where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings.

19. Considering the submissions made by Shri Pangam, the learned counsel of the petitioner, in my opinion this is a fit case to exercise the jurisdiction under Section 482 of the Code because, as it would be seen hereinafter, the process has been issued against the accused in violation of the statutory provisions of the Code which amounts to nothing short of abuse of the process of the Court.

20. The first submission of Shri Pangam, the learned counsel of the petitioner, is that the learned J.M.F.C. could not have taken cognizance of an offence under Section 188 I.P.C. in the absence of the complaint filed by the said District Magistrate. The second submission of learned Advocate Shri Pangam is that no notice under Section 141(1) of the Code was given to the petitioner and that only after giving of such notice and non-compliance thereof that an offence under Section 188 could have been completed.

21. Regarding the first submission, reference is required to be made to Section 195 of the Code. Section 195 deals with prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence. To the extent it is relevant to our case it provides that no Court shall take cognizance of any offence punishable under Sections 172 to 188 (both inclusive) of the Indian Penal Code (45 of 1860) except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate [See S.195(1)(a)(i)].

22. Admittedly, the learned District Magistrate did not file any complaint, a complaint as defined under Section 2(d) of the Code directly to the learned J.M.F.C., Mapusa. He filed a complaint or F.I.R. to the police and upon investigation into the same that a charge sheet came to be filed by the police against the accused to the learned J.M.F.C. and based on the said charge sheet that process came to be issued to the petitioner/accused.

23. On behalf of the respondent, Shri Sardessai has placed reliance on a decision of the Division Bench of this Court in the case of **Col. B.S.**

**Khatri v. State of Maharashtra & Anr.** (2003 All MR (Cri) 1925) wherein the Division Bench of this Court referring to the case of State of Punjab v. Raj Singh (1998) 2 SCC 391 observed that Section 195 of the Code comes into operation at the stage when the Court intends to take cognizance of an offence under Section 190(1) of the Code; and it has nothing to do with the statutory power of the police to investigate under the Code into an F.I.R. which discloses a cognizable offence, in accordance with Chapter XII of the Code even if the offence is alleged to have been committed in, or in relation to, any proceeding in court. In other words, the statutory power of the police to investigate under the Code is not in any way controlled or circumscribed by Section 195 Cr.P.C. It is of course true that upon the charge-sheet (challan), if any, filed on completion of the investigation into such an offence the court would not be competent to take cognizance thereof in view of the embargo of Section 195(1)(b) Cr.P.C., but nothing therein deters the court from filing a complaint for the offence on the basis of the FIR (filed by the aggrieved private party) and the materials collected during investigation, provided it forms the requisite opinion and follows the procedure laid down in Section 340 CrPC, the court would not be

competent to take cognizance (emphasis supplied).

24. In the case of **M. Narayandas v. State of Karnataka** (supra) the Hon'ble Supreme Court again referred to the said case of **State of Punjab v. Raj Singh** (supra) and held that they were bound by the said judgment and were in complete agreement and further stated that Sections 195 and 340 of the Code do not control or circumscribe the power of the police to investigate under the Code. Once investigation is completed then the embargo in Section 195 would come into play and the court would not be competent to take cognizance.

25. There is no doubt that the police were entitled to investigate the case under Section 188 I.P.C., upon first information or complaint having been filed by the learned District Magistrate in that regard. But after completion of investigation the bar of section 195(1)(a)(i) would come into force to prevent the Court from taking cognizance of the said offence in the absence of a complaint from the District Magistrate, a complaint as defined under section 2(d) of the Code. It is therefore obvious that the order of the learned J.M.F.C. issuing process against the accused is an order which contravenes the provisions of Section 195 of

the Code and therefore deserves to be set aside. In other words the learned J.M.F.C. in the absence of a complaint from the District Magistrate could not have issued process against the accused. The case of Col. B.S. Khatri (supra) is not of any assistance to the Respondent. On the contrary it helps the Petitioner.

26. Regarding the second submission, it may be stated that Section 141 of the Code provides for the consequences of disobedience after the order is made absolute. Sub-section (1) of section 141 provides that " when an order has been made absolute under S.136 or S.138, the Magistrate shall give notice of the same to the person against whom the order was made, and shall further require him to perform the act directed by the order within a time to be fixed in the notice (emphasis supplied) and inform him, that in case of disobedience he will be liable to the penalty provided by S.188 of I.P.C."

27. Admittedly, the conditional order issued by the learned District Magistrate was made absolute by him on 21.11.2000. However the said order dated 21.11.2000 did not require the petitioner or for that matter the said Company to salvage and take away the said vessel within any prescribed period

nor did it inform the petitioner that he would be liable for any penalty as provided under S.188 I.P.C. on his failure to take away the vessel, and this was inspite of the fact that the learned Addl. Sessions Judge, by his Order dated 22.5.2001 had required that the requirements of Section 141(1) of the Code be followed. As already seen, such a notice as stipulated under Section 141(1) of the Code came to be issued to the Company only on 31.7.2001. The petitioner could have been prosecuted, if at all, under Section 188 of the Code upon expiry of 30 days after the said notice dated 31.7.2001 issued under Section 141(1) of the Code was served upon the petitioner/Company and the Petitioner had failed to comply with the same. However, we have already seen that the learned District Magistrate much before issuing any notice under Section 141(1) of the Code and fixing time for the act to be performed and informing the petitioner that in case of disobedience he would be prosecuted under Section 188 of the Code, had filed a complaint/FIR before the police on 19.6.2001 In other words, the said complaint dated 19.6.2001 was premature. The petitioner/Company could have been prosecuted for an offence under Section 188 only after the provisions under Section 141(1) of the Code were complied with. In this view of the matter

also, the learned J.M.F.C. was not at all justified in issuingprocess against the accused under Section 188 I.P.C.

28. In my view, the learned J.M.F.C. issued process against the accused in total disregard to the provisions of Section 141(1) and Section 195(1)(a)(i) of the Code which created bar for issuance of process under Section 188 I.P.C. Consequently, in my view this is a fit case to exercise jurisdiction u/s 482 of the Code to prevent the abuse of the process of court in issuing process against the petitioner/accused and secure the ends of justice.

29. The petition therefore deserves to succeed. The order of the learned J.M.F.C. issuing process against the Petitioner/accused as well as all other accused under Section 188 I.P.C. is hereby quashed and set aside. Petition allowed. No order as to costs.

**N. A. BRITTO, J.**

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